Halpak Plastics, Inc. *and* Amalgamated Union, Local 1, National Organization of Industrial Trade Unions. Case 29–CA–12447

February 12, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On September 26, 1990, Administrative Law Judge Eleanor MacDonald issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Halpak Plastics, Inc., Oceanside, New York, its officers, agents, successors, and assigns, shall pay David Pietri the sums set out in the recommended supplemental Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that David Pietri made reasonable efforts to find interim employment while awaiting reinstatement by the Respondent, we note, in addition to the reasons set forth by the judge, that Pietri did in fact work during 11 of the 12 quarters of the backpay period. See *Southern Household Products Co.*, 203 NLRB 881 (1973).

Craig L. Cohen, Esq., for the General Counsel.
Suzanne Youssef, Esq. and *Martin H. Scher, Esq. (Law Offices of Martin H. Scher)*, of Carle Place, New York, for the Respondent.
Wendell V. Shepherd, Esq. (Roy Barnes, P.C.), of New York, New York, for the Charging Party.

SUPPLEMENTAL DECISION

ELEANOR MACDONALD, Administrative Law Judge. On December 16, 1987, the National Labor Relations Board issued its Decision and Order at 287 NLRB 700, finding that Respondent Halpak Plastics, Inc. had unlawfully discharged David Pietri and ordering Respondent to reinstate Pietri and make him whole for any loss of earnings and other benefits. On June 21, 1988, the United States Court of Appeals for the Second Circuit enforced the Order of the Board. On October 31, 1989, the Regional Director for Region 29 issued a backpay specification and notice of hearing alleging certain amounts of backpay due to Pietri and reserving the right to claim moneys or contributions due to Pietri under Respondent's pension plan. The specification was amended at the hearing in certain minor respects. The net backpay claimed on behalf of Pietri is $22,861.36. The backpay period ends on February 16, 1989, the effective date of Respondent's offer of reinstatement to Pietri.

Respondent submitted an answer on December 7, 1989, alleging that the adjusted hours claimed on behalf of Pietri were not properly calculated and that a different basis of calculating the hours was called for by certain facts. The answer alleged that Pietri's interim earnings were understated and that Pietri did not properly mitigate damages in that he rejected substantially equivalent employment in the second quarter of 1988.

This matter was heard by me on April 4 and 16, 1990.

The record was kept open pending receipt of a copy of Halpak's pension plan and receipt of certain information from the actuary responsible for administering that plan. On April 26, 1990, Respondent requested that certain evidence relating to Pietri's membership in the pension plan of another employer be received into evidence.[1] By Order dated May 30, 1990, the information from the actuary was received into evidence as Administrative Law Judge's Exhibits 1 and 2, the evidence proffered by Respondent was rejected, the record was closed, and the date for the submission of briefs was set for July 3, 1990. By Order of June 29, 1990, Respondent's request for reconsideration of the Order of May 30 was denied on the ground that the original request to admit the evidence was not served on all the parties to the proceeding and that the evidence was not newly discovered. Additional time was granted for Respondent to submit a copy of its pension plan and a new date for the submission of briefs was set for September 10, 1990.

On the entire record, including my observations of the witnesses and on due consideration of the briefs filed by the General Counsel and the Respondent in September 1990, I make the following[2]

FINDINGS OF FACT

A. *The Specification*

The General Counsel presented a witness to testify as to the calculation of gross backpay on a quarterly basis. Based on the payroll records provided by Respondent, the General Counsel asserted that Pietri would have received one wage increase during the backpay period; a number of employees received merit increases during that time and some employees received more than one such increase. In the case of Pietri, however, the General Counsel calculated that he would have received an increase on February 10, 1987, at the same time that two out of three employees received such increases. The amount of the asserted increase was calculated at 75 cents per hour, an average amount. From May 19, 1986, to February 9, 1987, wages were calculated to be $11.50 per hour, the amount Pietri was earning at his dis-

[1] The only relevance of this information was for a possible collateral attack on Pietri's credibility; the information does not relate to the amount of backpay due in the instant proceeding.

[2] The record is corrected so that at p. 25, L. 22, the date is ''88.'' Respondent's motion to reopen the record dated August 17, 1990, is granted, and the summary of Halpak's defined benefit pension plan is admitted into evidence as R. Exh. 4.

charge, and from February 10, 1987, to February 16, 1989, wages were calculated to be $12.25 per hour. The General Counsel computed the quarterly gross backpay based on Pietri's regular workweek of 40 hours. Because Pietri worked overtime on a regular basis, the General Counsel looked at overtime work by comparable employees during the backpay period to calculate average overtime hours; the average was applied to calculate the number of overtime hours lost by Pietri during the backpay period. Regular hours were calculated at straight time pay, while overtime hours were calculated at 1.5 times straight time. The sum of straight time hours and overtime hours was used to calculate total adjusted hours on a quarterly basis. After calculation of gross backpay, Pietri's interim earnings were deducted and the net backpay was calculated on a quarterly basis.

B. *Pietri's Search for Interim Employment*

Pietri testified that he had been the head printer at Halpak. He began work there in 1981 and was discharged in 1986. Pietri had joined Halpak's pension plan. His duties consisted of setting up the machine for the other printers, supplying them with information, and operating the machine himself. Pietri stated that he has been in the printing business since 1953 and is not trained to do any other work. Pietri testified that he has no experience in any type of printing other than flexographic printing. He could have performed other functions if he were properly trained.

Pietri testified about his search for work after his unlawful discharge by Respondent. The week of his termination, he found work at Arcon Mills running a machine and teaching others how to print on a flexographic machine. Pietri worked at Arcon until he was terminated in early 1988 following a hospital stay of several days. He received a release to work from his doctor but Arcon informed him that he was no longer needed.

Following his discharge by Arcon, Pietri registered with the New York State Division of Unemployment. He reported to the job service office every week on Wednesday to see if there was work for him. In addition to seeking employment through the state job service office, Pietri checked with employers every week and he spoke to friends in the business to see if they were aware of job opportunities. He responded to newspaper ads. Some employers were not interested in him and did not wish to interview him. Some employers offered him work in the flexographic printing field but at rates of pay much lower than $11.50 per hour. Pietri did not accept these offers which would have paid him less than he was earning when he was unlawfully terminated by Respondent. He was interviewed by A. Kimbell Co., which was paying only $300 per week, but Kimbell did not offer him a job. Pietri did not apply to any employment agencies.

In the third quarter of 1988, Pietri found a job at Reknown Tag and Label by answering an ad in the newspaper. Reknown only had part-time work available; sometimes this was as little as 1 day per week and, on occasion, it might be as much as 5 days. While working part time at Reknown, Pietri continued to look for full-time work by scanning the ads in the newspapers.

After Pietri's eligibility for unemployment benefits ran out, he was telephoned by Martin Scher, Esq. on behalf of Respondent.[3] Scher told him that he wanted to meet with him concerning backpay; Scher asked Pietri about his employment history.

Scher, who represented Respondent in the underlying case, testified that he met with Pietri on February 18, 1989, to discuss Pietri's return to work at Halpak.[4] According to Scher, he asked Pietri about applying for work at K. Sidrane, Inc. Pietri told him that he did not apply for work at Sidrane because he did not like a certain individual named Thomas working at that company. According to Scher, Thomas had worked at Halpak and then moved to Sidrane. Scher could not recall whether Thomas was the one who was found to have discharged Pietri in the underlying case.[5] Pietri also told Scher that he had turned down work that paid only $7.50 or $8.50 per hour. Pietri said he consulted the newspaper ads only once a week because the ads only change once a week.

On cross-examination by counsel for Respondent, Pietri testified that he was familiar with a company named K. Sidrane, Inc., having worked there before being employed by Respondent. Pietri testified that Sidrane had a weekly ad in the newspaper for printers. Pietri did not apply for a position with Sidrane. Pietri denied telling Attorney Scher that he did not seek employment at Sidrane because an individual named Thomas worked there. Pietri stated that he informed Scher that he had once worked for Sidrane and that he left Sidrane when conditions were bad and he was on unfriendly terms with an officer of the company.

Hal Kaplan, the president of Respondent, testified that when he hired Pietri, the latter said he had experience on the flexographic machine and did not claim that he could operate other types of equipment. Kaplan stated that flexographic printing is similar to other types of printing.

C. *The Wage Increase*

Kaplan testified that Respondent's policy concerning wage increases was that they were given ''to employees who show certain signs of improvement or doing a decent job.'' Further, employees hired at a low rate are given increases to reach the rate promised when they were first hired. In 1987, Pietri was earning a lot more than other employees due to his many years of experience. Other employees in the printing department were Florentin Toc, who received an increase after having worked for Respondent for a short while, and Jimmy Dean, who was given a raise after going several years without any raise. A third printer, Kenneth Costa, did not receive a raise. Kaplan did not give any reason Costa did not receive an increase. On cross-examination by counsel for the General Counsel, however, Kaplan conceded that from 1986 to 1989 all the printing employees of Respondent received at least one raise in pay. Kaplan testified that Pietri earned more when he was terminated than he had when he began to work for Respondent in 1981.

Seymour Naps, plant manager of Respondent since May 1987, testified that he is an electronic engineer by training.

[3] Pietri could not recall when this occurred but it was probably in 1988.

[4] Scher stated that he only met with Pietri once, and that was in 1989, not in 1988.

[5] The decision of Administrative Law Judge Lawrence in the underlying case is replete with references to Thomas and to his testimony. Thomas was the supervisor who discharged Pietri after Respondent learned of his activity in support of the Union.

He learned to operate the presses in 1-1/2 days. Naps testified that the Respondent did not give uniform wage increases. There was no company policy relative to highly paid employees. However, Naps tried to conduct a yearly review of employees, but he did not always grant a yearly increase. Naps supervised Pietri during his brief reinstatement.[6] He stated that he would not have given Pietri an increase at that time because his work was below standard, he did not follow directions, and he had a bad attitude.

D. *The Pension Plan*

Ronald Meyers, an enrolled actuary, is the chief actuary for the organization which administers Respondent's pension plan.[7] This plan is a defined benefit plan; that is, it is designed to produce a monthly benefit to participants at the retirement age of 65 years.[8] A participant in the plan does not have an account balance, but has a portion of the assets that are provided by the employer to fund the plan. Meyers stated that when Pietri was discharged by Respondent, he was entitled to a monthly benefit of $121.67 per month. Based on the actuarial and interest assumptions mandated in the plan, this was worth $8728 at the time of Pietri's termination. Meyers later calculated that if Pietri had been employed until February 16, 1989, he would be entitled to a monthly retirement benefit of $191.50 at age 65.[9] The present value of that benefit is $16,130.61. Pursuant to the plan, according to Meyers, lump sums under $3500 may be paid out by the plan trustee. But precedent of the plan provides that sums over $3500 may not be paid out prior to the 65th birthday of the participant. If the trustee were to break this precedent, it would be obliged to pay out all other such sums in the future in order to avoid acting in a discriminatory manner. Meyers testified that the trustee would be engaging in discrimination, from the point of view of the plan, if it paid out a lump sum over $3500 because the interest on the sum paid out to Pietri would be lost to the other plan participants. Further, spousal consent is now necessary to a participant's receipt of a lump sum over $3500 in lieu of a monthly payout and the lack of such consent would bar the trustee from making a lump-sum payment to Pietri.

The General Counsel seeks an order requiring Respondent to contribute to the pension plan amounts necessary for the payment of a pension to Pietri once he reaches age 65 of a monthly benefit of $191.50 in accordance with the terms of the plan.

E. *Discussion and Conclusions*

I find that General Counsel has shown that Pietri would have received a wage increase of 75 cents on February 10, 1987. All of Respondent's printers received at least one wage increase between 1986 and 1989. Respondent does not dispute that 75 cents was the average wage increase given during that period. I do not give any weight to Naps' testimony that Pietri was not a good worker during his short reinstatement in 1989. The question before me requires a finding whether Pietri would have received an increase in 1987. Respondent has not shown that he would not have been granted the increase. I note that although it may be difficult to meet this burden, that is a consequence of Respondent's unlawful action which it alone must bear.

At the hearing, counsel for Respondent stated his intention to introduce Respondent's payroll records to show that during the backpay period Respondent's employees in the printing department worked less than 40 hours per week as a result of layoffs and a fall in business. Based on those records, counsel for Respondent asserted that the General Counsel's calculations on backpay are in error. When asked by the administrative law judge how he was intending to prove his case given his intention not to have a witness testify concerning the payroll records and what they were purported to show, counsel for the Respondent replied that he would explain the records in his brief. The administrative law judge cautioned counsel that it was his burden, and not the burden of the court, to make the appropriate calculations based on the records. Counsel was specifically cautioned that it was his task to go through the records and explain what they mean and that he could not merely place the records in evidence and rely on a flat statement to convince the judge. Counsel was told that it was his job to go through the records and show how they supported his contention that employees worked less than 40 hours per week. Later in the hearing, counsel for Respondent was again cautioned that the administrative law judge would not pore over the payroll records to try to determine which employees worked a certain number of hours and earned a certain amount per week; counsel was told ''that is something that you have to do.''

Respondent contends that General Counsel erred in basing the specification on a 40-hour workweek resulting in 520 straight time hours per quarter. It urges that there were layoffs during the backpay period. I cannot find that there were any layoffs because no witness testified to this fact; it is an unsupported assertion in Respondent's brief. Nor do the payroll records establish that there were layoffs. The payroll records show that many employees worked 40 regular hours per week, and they also show that some employees did not work 40 hours per week for certain weeks. But the payroll records do not show that the employees working less than 40 hours per week were on layoff. For aught that appears in the evidence before me, these employees were unavailable for work for other reasons. Moreover, Pietri was the head printer and there is no evidence before me to show that even if there had been a layoff Pietri would have been affected in a manner similar to the less senior printing department employees.

A similar analysis must be applied to Respondent's contention that Pietri would not have worked the overtime hours claimed by the General Counsel in the specification. The payroll records show that employees worked certain overtime hours for each quarter in the backpay period. The General Counsel found the average overtime hours worked per quarter by the employees and applied this to the backpay calculations for Pietri. Respondent's answer provides average overtime hours that, in some quarters, are identical to the General Counsel's figures and, in some other quarters, are different from General Counsel's figures. But nowhere does Respond-

[6] The record does not disclose the precise reasons for Pietri's leaving Halpak after his reinstatement.

[7] An enrolled actuary is co-licensed by the Department of Labor and the Internal Revenue Service to practice before the Internal Revenue Service in connection with defined benefit pension plans.

[8] The plan sponsor of a defined benefit plan is required to contribute a sum each year sufficient for the plan to meet its future liabilities. The sum varies with the liabilities and with the performance of the assets already in the fund.

[9] This amount would be the same if Pietri had continued in Respondent's employ for any length of time until August 31, 1989, the plan anniversary date. See ALJ Exhs. 1 and 2.

ent explain what method it used to arrive at the different average overtime figures. I have analyzed the payroll records for certain of these quarters and I cannot understand what computation Respondent may have used to arrive at the figures in its answer. Respondent was cautioned twice that it must provide both facts and a rationale to support its answer if it wished to dispute the amounts claimed by the General Counsel. This it has failed to do. Therefore, I find that the General Counsel has correctly calculated the gross backpay due to Pietri.

The General Counsel has the burden of proof to show that Respondent was guilty of an unfair labor practice and the General Counsel has the further burden of proof to show the gross amounts of backpay due to an unlawfully discharged employee. ''When this has been done, however, the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability.'' *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963). In the instant case, the General Counsel has shown the gross amounts of backpay due per quarter. Respondent must now show that Pietri did not mitigate damages.

The facts show that immediately after his unlawful discharge by Respondent, Pietri found full-time employment with Arcon which he held until he was terminated following an illness in early 1988. Respondent has not shown that during this period Pietri failed properly to mitigate damages.

After his discharge from Arcon, Pietri registered with the State Division and reported weekly to the job service. He checked with various employers every week, spoke to friends in the business, and he consulted newspaper advertisements on a weekly basis. It is well established that an unlawfully discharged employee is required to make ''reasonable exertions'' to find interim employment while awaiting reinstatement by the employer; he is not held to the highest standard of diligence and any uncertainty in the evidence is resolved against the wrongdoer. *Rainbow Coaches*, 280 NLRB 166, 180 (1986). I find from the evidence before me that Pietri did make the required reasonable exertions to find interim employment.

Pietri testified that he received and rejected offers to work in his field at rates much lower than the $11.50 per hour he had been earning when Respondent unlawfully discharged him. Although the record does not show the wages actually being offered, Scher testified that Pietri told him he had refused employment that paid only $7.50 or $8.50 per hour. The difference between these wages and the hourly wage of $11.50 Pietri was earning when he was unlawfully discharged or the $12.25 wage he would have earned after having received a raise from Respondent in 1987 was substantial. I find that Pietri was not required to accept employment which would have reduced his wages by such significant amounts. *Waukegan-North Chicago Transit Co*., 235 NLRB 802 fn. 4 (1978).

Although Respondent argues that Pietri refused work at A. Kimbell Co., the evidence shows that Pietri was never offered a job by that company. Respondent makes much of the fact that Pietri did not apply for work at K. Sidrane, Inc., a company that weekly advertised for printers. Pietri testified, and I credit him, that he did not apply for a job at Sidrane because he had once worked for that company and had resigned when conditions deteriorated and he was on bad terms with an officer of the firm.[10] I need not consider whether it was wrong for Pietri to omit Sidrane from his search; before such a determination is necessary, Respondent must show that Sidrane would have offered Pietri a position had he applied for work. *Rainbow Coaches*, supra at 189.

Similarly, Respondent argues that Pietri should have searched for work not only in his own field of flexographic printing but also in other printing fields. Respondent urges that Pietri could have easily learned a new field. Respondent's argument on this point must also fail. There is no evidence in the record to show that there was an employer in the printing field, paying wages similar to those Pietri had earned at Halpak, and willing to offer Pietri a job in a related field and to train him to perform that job. It was Respondent's burden to show that such a potential employer for Pietri existed during the backpay period. Respondent did not meet that burden.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Halpak Plastics, Inc., Oceanside, New York, its officers, agents, successors, and assigns, shall pay to David Pietri the sum of $22,861.36 plus interest. Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and accrued to the date of payment, minus the tax withholdings required by Federal, state, and local laws. Respondent shall contribute to its defined benefit pension plan such amounts as shall be necessary for the payment to David Pietri once he reaches the age of 65 a monthly benefit of $191.50.

[10] I do not credit Scher's testimony that Pietri told him he did not apply to Sidrane because an individual named Thomas worked there. My observation of Scher and my reading of his testimony convince me that his recollection is inaccurate.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.